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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1535

JOHN FRANZESE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 1, 1971

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IN THE

Supreme Court of the United States

October Term, 1970

No.

JOHN FRANZESE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, John Franzese, prays that a Writ of Certiorari issue to review the judgment entered on March 2, 1971, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee vs. John Franzese, also known as "Sonny", Appellant, Docket No. 35531.

Opinions Below

The Order of the District Court denying Petitioner's Motion for a new trial was affirmed by the Court of Appeals for the Second Circuit, Per Curiam, on the opinion of Judge Mishler below. Judge Mishler's opinion appears in the appendix at P. A . The Judgment of the Court of Appeals appears in the Appendix at page A 1. Petitioner's Judgment of Conviction was originally affirmed

by the United States Court of Appeals for the Second Circuit in the proceeding entitled "United States of America, Appellee, vs. John Franzese, 392 F. 2d 954 (2nd Cir., 1968), vacated 394 U.S. 310 (1969)".

Jurisdiction

The judgment of the Court of Appeals was entered on March 2, 1971. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Is newly discovered evidence of a Government memorandum that contained material favorable to the accused, sufficient basis for a new trial where that memorandum was either intentionally or negligently withheld?

2. Where an issue of prosecutorial misconduct is raised, does a Motion for a new trial based on newly discovered evidence of such misconduct, require an evidentiary hearing?

Statutory Provisions

Rule 33 of the Federal Rules of Criminal Procedure.

Rule 33. New Trial

The Court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a

new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended February 28, 1966, eff. July 1, 1966.

Constitutional Provision Involved

Constitution of the United States, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statement of the Case

The Petitioner, John Franzese, was convicted in the United States District Court for the Eastern District of New York of three counts of violation of Title 18, United States Code, Sections 2113 and 2 and one count of conspiracy in violation of Title 18, United States Code, Section 371. As a result of said conviction Petitioner was sentenced to the custody of the Attorney General for a combined term of fifty years and fined in the amount of $20,000.00. The Petitioner appealed that judgment of conviction in the United States Court of Appeals for the Second Circuit wherein that conviction was affirmed. United States v. Franzese, 392 F. 2d 954 (2nd Cir., 1968). With respect to that judgment, a Petition for Certiorari to review the Circuit Court's decision was filed and subsequently

granted by this Court. This Court in *Giordano* v. *United States,* 394 U.S. 310 (1969) vacated the judgment of the Court of Appeals and remanded the case to the District Court to determine the legality of electronic surveillance. Upon a remand of the action, the District Court determined that the Petitioner's conviction was untainted by any illegal surveillance. An Appeal from this finding was not prosecuted.

Subsequent to the decision of the District Court regarding the legality of the electronic surveillance, Petitioner filed a Motion for a new trial based on newly discovered evidence. The District Court denied Petitioner's motion and this Order was affirmed by the Circuit Court. The facts which underlie the question herein presented relate to a certain memorandum made by the United States Attorney for the Eastern District of New York which was either intentionally or negligently withheld from both the Court and defense counsel at the time the action was tried.

The Government, in its direct case, alleged that the Petitioner John Franzese, was the mastermind of a conspiracy to rob Federally insured banks. The Government's proof in support of these allegations was almost entirely based upon the testimony of four witnesses who by their own admission were participants in some or all of these robberies. The testimony of these witnesses cast the Appellant not as an actual participant in the robberies themselves, but rather as both producer and director of their nefarious schemes. The credibility of these four men, Smith, Cordero, Parks and Zaher, was perhaps the single most important issue to be presented to the jury.

The memorandum which served as the bases for Petitioner's rule 33 Motion was recorded by Joseph P. Hoey,

then United States Attorney for the Eastern District of New York, as a result of a conversation with Smith, Cordero, Parks and Zaher at the Federal Penitentiary in Danbury, Connecticut on March 11, 1966, prior to the trial of the action herein. This memorandum was never turned over to defense counsel nor was it made available to the Court for an *in camera* inspection to determine its producibility under the Jencks Act.

Petitioner discovered the existence of this memorandum in an unrelated proceeding entitled *U.S.* v. *Thomas Mattio*, —— F. Supp. —— (E.D.N.Y.—June 13, 1968), where Mr. Hoey testified as to his conversation with the four robber-witnesses and the subsequent recording made by him.

The contents of this two page memorandum reviews the prospective testimony of the witnesses and reflects that Cordero, Parks, Smith and Zaher would be able to implicate the Appellant in the "planning and execution" of diverse bank robberies in return for the promise that their cooperation would be made known to the sentencing judge. (a 49)* The memorandum recited that Cordero and Zaher "would be able to testify as to direct contacts with Franzese in the planning of the bank robberies as well as the distribution of the monies". Parks and Smith would be able to corroborate the testimony of the other two witnesses through conversations had with two other persons, who also would be defendants, immediately after a meeting in which Franzese discussed proposed robberies with Cordero and Zaher in a motel in Queens County. (a 49)

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* The letter "a" refers to the Petitioner's Appendix to the Brief filed in the United States Court of Appeals for the Second Circuit.

At the trial of the action herein, James Smith, the Government's principal witness, testified that at an alleged organization meeting, both he and Parks had direct contact with Petitioner, John Franzese. There is no question but that this contact was with regard to the planning of the bank robberies as well as the distribution of monies. Smith's testimony was, of course, entirely inconsistent with the projected testimony of both he and Parks, as recorded in Mr. Hoey's memorandum of the earlier interview with him. At the trial, the testimony of Smith went well beyond a mere corroboration of Cordero's and Zaher's testimony with regard to contact with the Petitioner, but rather changed the shape and structure of the meeting by placing Smith with Franzese and Parks as well as three of the other defendants.

It should be noted that the Assistant United States Attorney who represented the Government at the trial of the action herein not only had access to this inconsistency which was part of the Government's file, but was actually present at that March 11, 1966 meeting in Danbury, Connecticut.

Reasons for Granting the Writ

The decision below raises a critical issue concerning the proper administration of Federal criminal justice. Fundamental fairness in a criminal prosecution, the very cornerstone of the due process clause, has been violated in a way that violently clashes with basic rights of defendants, rights which this Court has consistently sought to protect.

The Decision Below Directly Conflicts With the Due Process Principles Enunciated in This Court's Ruling in *Brady v. Maryland*

The Petitioner, John Franzese's Motion for a new trial presented yet another accusation of prosecutorial misconduct in a prosecution which bore the stigma of Government wrongdoing in the form of withholding evidence favorable to the accused.[1] The Petitioner, it is respectfully submitted, has clearly shown that the memorandum in issue, which was first disclosed in the Government's affidavit in opposition to Petitioner's Rule 33 motion, contains material which is favorable to the accused and within the purview of *Brady* v. *Maryland,* 373 U.S. 83 (1963). The Petitioner alleges that the existence of "Brady material" which has either been negligently or intentionally withheld from the defense is a sufficient basis for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.

As developed in our statement of facts, the memorandum in issue, prepared by an experienced and capable trial lawyer who attempted to capsulize the projected testimony of the four prospective witnesses, clearly revealed that Smith would only be able to corroborate Cordero and Zaher's testimony as to direct contacts with the Petitioner, *"through conversations had with two other persons, who also be defendants,*

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[1] In the case of *United States* v. *Polisi,* 416 F. 2d 573 (2nd Cir. 1969), which involved the same bank robbery conspiracy, the United States Court of Appeals for the Second Circuit reversed a judgment of convicton and ordered a new trial where the Government withheld a conflicting statement as to the defendant Anthony Polisi's role in the conspiracy. At the Polisi trial, Smith, Parks and Zaher described Polisi as the mastermind of the bank robbery scheme. At the trial of the instant case, Polisi was relegated to a rather minor role, while Franzese became the principal figure.

immediately after a meeting in which Franzese discussed proposed robberies with Cordero and Zaher in a motel in Queens County''. (a 49)* (Emphasis supplied) From this precise and accurate statement there can be no question but that during that interview at the Federal Penitentiary, Smith, who was interviewed separately, as were the other three, related to Mr. Hoey that he had no direct contact with the Petitioner. (a 56, 58) Almost one year later, at the trial of the action, Smith boldly stated that he had direct contact and conversations with the Petitioner, John Franzese. (R 73-83)* Again, it should be noted that the credibility of these accomplice-witnesses was perhaps the single most important issue to be presented to the jury.

The Circuit Court affirmed the denial of the Petitioner's motion for a new trial on the opinion of the Trial Court below. The District Court summarily held, without benefit of an evidentiary hearing, that ''A plain reading of the memorandum is a simple answer to the claim under *Brady*''. (a 68-69) In view of the apparent inconsistent testimony, Petitioner fails to understand the cursory treatment of the Brady issue. It is further submitted that the memorandum may have had even a greater import if a hearing had revealed that the non-disclosure of the memorandum was a calculated act on the part of the Government. In a system of justice which must, in so many instances, rely on unilateral fair play by the Government, a substantial claim of misconduct must be met, it is respectfully submitted, by a full and complete disclosure of all relevant facts and circumstances.

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* "R" refers to the trial transcript on file in the U.S. Court of App. for the second circuit.

Moreover, the decisions of this Court and the various Circuit Courts of Appeal give the Petitioner cause to find irreconcilable the decision of the Circuit Court in the instant case and principles previously considered to be well established. Over thirty-five years ago, this Court held, in *Mooney* v. *Holohan,* 294 U.S. 103 (1935), that a prosecuting attorney was under a Constitutional duty to disclose evidence which was beneficial to the defendant's case. There it was held that a conviction obtained through the use of knowingly false and perjured testimony cannot be permitted to stand. In *Napue* v. *State of Illinois,* 360 U.S. 264 (1959), this Court extended the above stated rule and held that a defendant's Constitutional rights to due process is also denied when false testimony relates to the credibility of the witness as well as the substance of the testimony.

Four years later, the *Brady* decision was handed down, standing for the proposition that due process forbids the Government to "withhold . . . evidence favorable to an accused upon request . . . where that evidence is material to either guilt or punishment." (373 U.S. at p. 87) Thus, under the *Brady* rule, evidence under the control of the Government which is "material" and "favorable" to an accused's defense must be divulged. In the case at bar there can be no question but that the memorandum was material, favorable and withheld. The issue at bar is once again whether the failure of the Government to divulge such information, is sufficient basis for a new trial.

The decision of the Second Circuit Court of Appeals in *United States* v. *Polisi,* (*supra,*) while seeking to clarify the applicable standards with respect to a new trial where prosecutorial misconduct is involved, apparently has left

much confusion in its path. See for example *Giglio* v. *United States* —— F. 2d —— (2nd Cir., Sept. 23, 1970) Petition for Certiorari granted March 1, 1971. In *Polisi,* the Court stated that the general rules with respect to the granting of a new trial, i.e. the generally held essentials set forth in *United States* v. *Costello,* 255 F.2d 876 (2nd Cir., 1958) do not apply

> ". . . where the prosecutor has suppressed evidence exculpatory of or otherwise favorable to the accused." (577)

The *Polisi* Court, by applying the principles set forth in *Brady,* reached the conclusion that a defendant is entitled to a new trial even where the suppressed evidence would probably not have caused a different verdict. In the District Court's opinion in the instant case, it is stated in conclusion, that "The statement is not the kind of evidence that would probably produce a different verdict". (A 73) Although it is a matter of endless speculation as to what would probably produce a different verdict, the burning issue is whether the relevancy of this question survives *Polisi.* In other words where the Government has acted in an underhanded manner, exactly what factors must be demonstrated before the breach may be categorized as new trial material. The fact that the problem is left to speculation again dramatizes the necessity for this Court to review this issue which is of such pragmatic and fundamental importance to the proper administration of criminal justice.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted

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April 1, 1971

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 616—September Term, 1970.

(Argued January 21, 1971 Decided March 2, 1971.)

Docket No. 35531

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN FRANZESE, also known as "Sonny,"

Appellant.

Before:

MEDINA, HAYS and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge.*

Appellant appeals from an order denying appellant's motion for a new trial. Affirmed.

THOMAS P. PUCCIO, Assistant United States Attorney, Brooklyn, New York (David G. Trager, Assistant United States Attorney, and Edward R. Neaher, United States Attorney for the Eastern District of New York, Brooklyn, New York, on the brief), *for appellee.*

MAURICE EDELBAUM, New York, N. Y. (*James* M. LaRossa, New York, N. Y., on the brief), *for appellant.*

PER CURIAM:

We affirm on the opinion of Chief Judge Mishler below, —— F. Supp. —— (E.D.N.Y. August 12, 1970).

Memorandum Decision of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 66-CR-161

August 12, 1970

UNITED STATES OF AMERICA,

—against—

JOHN FRANZESE, also known as "Sonny",

Defendant

Defendant moves for a new trial on the ground of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

The affidavit in support of the motion states that the evidence was discovered in a hearing in another criminal proceeding held before U. S. District Judge John F. Dooling, Jr., subsequent to the trial in the above matter. It was revealed in that hearing that on Friday, March 11, 1966, the Honorable Joseph P. Hoey, United States Attorney for the Eastern District of New York, together with F.B.I. Agents Thatcher and Murphy and Assistant United States Attorney Michael Gillen, visited the Federal Correctional Institution at Danbury to interview John Joseph Cordero, Richard Paul Parks, James Joseph Smith and Charles Zaher, inmates of the institution, concerning their willingness to give testimony concerning defendant

and supply information concerning bank robberies commited in various parts of the country. When Mr. Hoey and his party arrived at Danbury, he interviewed the aforementioned inmates. Mr. Hoey made a memorandum of the interview on Monday, March 14, 1966.

The memorandum notes that Cordero, Parks, Smith and Zaher have indicated their willingness to testify concerning the defendant's participation in the various bank robberies. It states:

> "Cordero and Zaher would be able to testify as to the direct contracts with Franzese in the planning of the bank robberies as well as the distribution of the monies. Parks and Smith would in a way be able to corroborate the testimony of the other two through conversations had with two other persons, who would also be defendants, immediately after a meeting in which Franzese discussed proposed robberies with Cordero and Zaher in a motel in Queens County."

The balance of the memorandum deals with the efforts of each inmate to obtain a promise from Mr. Hoey of the sentence that would be imposed (having already pleaded guilty to the relevant counts in the indictment) and Mr. Hoey pointing out that he would advise the sentencing judge as to their cooperation.

The trial against the defendant and four co-defendants started on January 31, 1967 and terminated on March 2, 1967 with a verdict finding defendant and his co-defendants guilty as charged in the indictment. The trial transcript is approximately 4,400 pages. The court has reread the relevant portions of the transcript. The defendant seeks

an evidentiary hearing to determine whether the memorandum was producible at the trial under 18 U.S.C. § 3500 or under *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). On the trial record and the papers submitted on this motion, including the memorandum and the excerpt of the testimony of Mr. Hoey concerning the memorandum, I find that the court can pass on the merits of the motion without an evidentiary hearing. *United States* v. *Johnson*, 327 U. S. 106, 112, 66 S.Ct. 464, 466 (1946); *United States* v. *Troche*, 213 F. 2d 401, 403 (2d Cir. 1954).

Under *Brady*, the defendant would have been entitled to evidence favorable to him. A plain reading of the memorandum is a simple answer to the claim under *Brady*. The same is true for defendant's claim that the memorandum was producible under 18 U.S.C. § 3500. A statement is defined under subdivision (e) of section 3500 as

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

If the statement is "... the product of the investigator's selections, interpretations and interpolations" *Palermo* v. *United States*, 360 U.S. 343, 350, 79 S. Ct. 1217, 1223 (1959) rather than the witness', the statement does not come within the purview of subdivision (e) of section 3500. *Matthew* v. *United States*, 407 F.2d 1371 (5th Cir. 1969); *Menendez* v.

United States, 393 F. 2d 372 (5th Cir. 1968). Thus witness sheets containing the anticipated testimony of Government witnesses not made, signed or adopted by the witness, are not producible under Section 3500. *United States* v. *Meyerson,* 368 F. 2d 393 (2d Cir. 1966), *Cert. denied,* 386 U.S. 991, 87 S.Ct. 1305; *Hanks* v. *United States,* 388 F. 2d 171 (10th Cir. 1968).

The trial judge has discretion in determining whether statements are producible for impeachment purposes. *Lloyd* v. *United States,* 412 F. 2d 1084 (5th Cir. 1969); *Matthew* v. *United States, supra.* The court would not have directed that the statement be produced under section 3500 or *Brady.*

A substantial part of the trial time was consumed by defendant's attack on the credibility of the testimony supplied by the four Government witnesses who were accomplices. The cross-examination was based on impeaching testimony found in prior statements made by the witnesses, including grand jury testimony given by Parks, Smith and Cordero on March 24, 1966.

The burden of showing the right to a new trial rests on the moving party. *United States* v. *Lombardozzi,* 236 F. Supp. 957 (E.D.N.Y. 1964); *aff'd* 343 F. 2d 127 (2d Cir.), *Cert. denied* 381 U.S. 938, 85 S.Ct. 1771 (1965). The moving party is required to show that.

(1) the evidence was discovered since the trial;

(2) the newly discovered evidence is relevant to the factual issues at the trial, and not merely cumulative nor impeaching the character or credit of a witness;

(3) the newly discovered evidence is of such a nature that it would probably produce a different verdict in the event of a retrial.[1]

The statement is at best impeaching evidence. It is doubtful that it could have been used effectively as such since the trial testimony appears to have fulfilled Mr. Hoey's expectations.[2] The statement is not inconsistant with the trial

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[1] *United States* v. *Polisi*, 416 F. 2d 573, 576 (2d Cir. 1969) *citing United States* v. *Costello*, 255 F. 2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937, 78 S.Ct. 1385 (1968). The Court of Appeals in *Costello* pointed to the test laid down in *Berry v. State*, 10 Ga. 511, 527, in which six requirements are listed. It was there stated, ". . . a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness."

Defendant's brief seems to argue that *Polisi* modified the requirements for a new trial by eliminating the second (2) listed above. However, the Court, *in Polisi*, emphasized the high value of the suppressed evidence as a reason for not considering that requirement under the facts of *Polisi* where the suppressed testimony indicated perjury. It states, at p. 577:

> ". . . A prosecutor's failure to disclose evidence whose high value to the defense could not have escaped him requires a new trial, even where the perjury concerns only the credibility of the witness and not the facts at issue [cases cited]."

[2] Cordero and Zaher testified to conversations with Franzese at the Aqueduct Motor Inn about July 21, 1965, concerning the planning of bank robberies and the distribution of the proceeds of the robberies. (Cordero, Tr. T. pp. 1782-7, 1793-9, 1807, 1813, 1819-23, 1863-4, 1874-5, 1882-4, 1900-3, 1912-16, 1936-7; Zaher, Tr. T. pp. 1456-61)

Smith testified that he spoke to Florio at the bar of the Aqueduct Motor Inn on the night of the meeting while Cordero and Zaher were in conference with Franzese in an upstairs room and Florio advised him "that they had to straighten some things out . . ." (Tr. T. p. 88)

Parks testified to conversation with co-defendant Matera at the meeting in which Matera assured Parks that counsel and bail money would be supplied to the conspirators in the event that they were apprehended and their families supported (Tr. T. pp. 3373-74). Later, at the bar, co-defendants Polisi and Florio assured Parks and Smith that, "everything is all right." (Tr. T. p. 2375). Florio also said that co-defendant "Potere is with us on this and knows quite a bit about this stuff and things should go very well." (Tr. T. p. 2377)

testimony in any material respect. The transcript of the grand jury testimony of Parks and Smith, given on March 24, 1966 (which was turned over to defendant at the trial) covered in detail the information only suggested in the statement. The statement is not the kind of evidence that would probably produce a different verdict.

The motion is in all respect denied, and it is

So Ordered.

Jacob Mishler
U.S.D.J.